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No.

IN THE

Supreme Court of the United States

October Term, 1983

PRC HARRIS, INC.,
Petitioner,

v.

THE BOEING COMPANY,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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August 12, 1982

QUESTIONS PRESENTED

1. Rule 41(b) of the Federal Rules of Civil Procedure provides that certain kinds of dismissal will operate as "an adjudication upon the merits" unless the dismissing judge "otherwise specifies" in the order of dismissal. When the Court of Appeals for the Second Circuit held in this case that the rule applies to a prior dismissal in another jurisdiction based on the bar of that jurisdiction's statute of limitation, did it fail to heed this Court's nolding in Costello v. United States, 365 U.S. 265, 81 S.Ct. 545, 5 L.Ed.2d 551 (1961) that the rule does not apply to dismissals "which are based on a plaintiff's failure to comply

with a precondition requisite to the Court's going forward to determine the merits of his substantive claim," 365 U.S. at 285, 81 S.Ct. at 545, 5 L.Ed2d at 564, but only to those cases where the defendant "must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them" 365 U.S. at 286, 81 S.Ct at 545, 5 L.Ed2d at 565?

2. If this common-law breach of contract case could have been heard on the merits in the state trial court where it was pending, did it violate the principles of judicial federalism that inform Erie Rail Road Co. v. Tompkins and its progeny when the Second Circuit

upheld the case's removal from state court and the granting of summary judgment for defendant on a procedural ground that not only would not be followed by the state court but is not recognized in other circuits?

3. Does it violate principles of due process and full faith and credit if a court both refuses to hear a case on the merits and deprives the plaintiff of his right to present his case in another forum that would otherwise entertain it, absent either misconduct or waiver on the part of the plaintiff?

4. If Rule 41(b) is held to apply to a statute-of-limitation dismissal, thus justifying the district court's

grant of summary judgment in this case on res judicata grounds, was it an abuse of discretion for the Second Circuit to refuse to recognize an amendment of the prior judgment, obtained while the grant of summary judgment was on appeal, that made it clear that the prior dismissal was "without prejudice"?

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

PRC HARRIS, INC.,

Petitioner,

v.

THE BOEING COMPANY,

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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THE OPINIONS BELOW

The opinion of the Court of Appeals of which review is sought is reported at 700 F.2d 893. The district court's opinion is reported at 545 F.Supp. 438. Both opinions are included in the Appendix.

JURISDICTION

The opinion of the Court of Appeals was filed on February 18, 1982. (A1) A timely petition for rehearing *en banc* was denied on May 18, 1983 (A12). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

RULE INVOLVED

Rule 41(b) of the Federal Rules of Civil Procedure:

> (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall

> make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioner, PRC Harris, Inc., states that this is its original Designation of Corporate Relationships and that since this action was commenced it has become the PRC Harris division of PRC Engineering, Inc., a wholly-owned subsidiary of Planning Research Corporation. A list of affiliated entities is included at the end of the Appendix.

STATEMENT OF THE CASE

This is a breach-of-contract action that was brought in the Supreme Court of the State of New York, County of New York, and removed to the United States District Court for the Southern District of New York on the basis of diversity of citizenship. Petitioner is the plaintiff in this action.

Prior to bringing this action, plaintiff had asserted the same claim in the United States District Court for the District of Columbia. That action, after transfer pursuant to 28 U.S.C. §1404(a) to the District Court of the Western District of Washington, was dismissed, on the grounds that it had been

brought beyond the District of Columbia's three-year statute for breach-of-contract actions, which applied because the action had been commenced there. A copy of that decision is included in the Appendix to the Petition (A19) as is the judgment of dismissal (A29). This action was then commenced in New York, which has a six-year statute for breach-of-contract actions. Section 213, N.Y. Civil Practice Law and Rules. After removal, defendant immediately moved for summary judgment, arguing that Rule 41(b) of the Federal Rules of Civil Procedure rendered the prior dismissal a decision "on the merits", since the order of dismissal had not specified

that the dismissal was "without prejudice." Plaintiff argued that the Rule does not apply to dismissals based on a preliminary ground that prevents a consideration of the merits, and that an order that specifies that it is based solely on a statute of limitation does in fact specify that it is not on the merits. Alternatively, plaintiff asked the district judge for a stay of decision to allow an application to the district judge who had dismissed the prior action for a clarification of his decision. The district court denied (by implication) the request for a stay, granted summary judgment for defendant and ordered plaintiff to pay costs and

attorneys' fees totaling $2,135. (A14-19)

Plaintiff then commenced an appeal to the Court of Appeals for the Second Circuit, and also moved in the Western District of Washington, pursuant to Rule 60(b) FRCP, for an amendment of the prior judgment of dismissal. The motion was granted, in an order that stated that the prior dismissal "was not an adjudication on the merits and is without prejudice to the plaintiff's right to bring another action in another jurisdiction upon the actions from which their (sic) claims herein arise, subject to the appropriate statute of limitations of such other jurisdiction." (A31,32) An amended judgment was entered dismissing the action "without prejudice." (A35). Defendant did not appeal.

In the Second Circuit, plaintiff argued again that Rule 41(b) should not apply to a statute-of-limitation dismissal. Alternatively, it argued that the amendment of the prior judgement of dismissal to clarify that it was "without prejudice" should mandate the vacating of the summary judgment now shown to have rested on a misinterpretation of the intent of the prior dismissal.

Rejecting both arguments, the appellate court upheld the grant of summary judgment, although it reversed the award to attorneys' fees. (A1-11) The court held that Rule 41(b) does render a statute-of-limitation dismissal an adjudication "on the merits" unless the

dismissing judge adds the words "without prejudice" to his order of dismissal. The panel differed on their reasons for refusing to recognize the amended judgment of dismissal. The majority rested on its decision that the district judge for the Western District of Washington should not have granted the Rule 60(b) motion (A8) (positing, erroneously, that the motion had been made under Rule 60(b)-6 [A7]; in fact no section was specified. [see (A31]). Concurring, Judge Newman stated he would not consider whether the granting of the Rule 60(b) motion was error, but would hold simply that a plaintiff who "elects" to "forego" amending the prior judgment until after the entry of summary judgment

in the Southern District should not expect the Second Circuit to "reward his tardiness." (A11 n.2)

Plaintiff then petitioned for a rehearing en banc, but the petition was denied. (A12) This petition followed.

ARGUMENT

Point I

THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDING IN COSTELLO V. UNITED STATES AND CREATES A SPLIT AMONG THE CIRCUITS

A. The Decision Below Conflicts With a Decision of this Court

In Costello v. United States, 365 U.S. 265, 81 S.Ct. 545, 5 L.Ed.2d 551 (1961) this Court held that Rule 41(b), which renders certain dismissals adjudications "on the merits" unless the dismissing court otherwise specifies in the order of dismissal, does not apply to dismissals "which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the

merits of his substantive claim," 365 U.S. at 285, 81 S.Ct. at 545, 5 L.Ed.2d at 564, but only to those cases where the defendant "must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them." 365 U.S. at 286, 81 S.Ct. at 545, 5 L.Ed.2d at 545. That holding has since been applied in a variety of situations in which the prior dismissal was based upon an initial bar to plaintiff's presentation of the merits of his claim. See, e.g., McCarney v. Ford Motor Co., 657 F.2d 230, 234 (8th Cir. 1981); Johnson v. Boyd-Richardson Co., 650 F.2d 147, 148 (8th Cir. 1981); Weissinger v. United States, 423 F.2d 795, 798-99 (5th Cir. 1970) (en banc);

see generally 9 Wright & Miller, Federal Practice and Procedure, §2373 (1971). In this case, the opinion below recognized that the first dismissal of petitioner's claim, on the basis of a local statute of limitation "did not entail a consideration of the substantive issues raised" (A4) but failed to follow this Court's interpretation of the rule, asserting that Costello was "inapposite" because Costello "did not consider a dismissal on statute of limitations grounds." (A5 n.2) This is not a principled treatment of Costello, and that decision mandates reversal of the decision below.

It has long been recognized at common law that a dismissal on the grounds

of a local statute of limitation is not a decision on the merits and leaves the plaintiff free to sue in a jurisdiction with a longer statute. See Warner v. Buffalo Drydock Co., 67 F.2d 540, 541-43 (2d Cir. 1933), cert. denied, 291 U.S. 678, 54 S.Ct. 529, 78 L.Ed. 1066 (1934); Western Coal and Mining Co. v. Jones, 27 Cal.2d 819, 167 P.2d 719, 724 (1946) (en banc); Restatement (2d) Conflict of Laws §110 and Id. Comment (a); Restatement (2d) Judgments §19 and Id. Comment (f); Restatement of Judgments §49 and Id. Comment (a); see generally, Annot., 164 A.L.R. 693 (1946); 1B Moore's Federal Practice ¶0.409[6] (1983).

The first hint that the Second Circuit would hold that the common-law

rule had been altered by Rule 41(b) FRCP came in Bertha Building Corp. v. National Theatres Corp., 248 F.2d 833, 841 (2d Cir. 1957), cert. denied, 356 U.S. 936, 78 S.Ct. 777, 2 L.Ed2d 811 (1958). In dicta, over the dissent on other grounds of Learned Hand, the court said that the common-law rule had been "superseded" by Rule 41(b). 67 F.2d at 840.

That decision pre-dated Costello. The second time the question came before the Second Circuit, in Sack v. Low, 478 F.2d 360 (2d Cir. 1973), Judge Friendly wrote that the "remarks" in Bertha Building caused him "discomfort," 478 F.2d at 364, but said he was compelled to follow them. There was no discussion of Costello, but the result in that case

was the same as if Costello had been followed--i.e., the plaintiff was allowed to bring his second suit--because while the appeal was pending plaintiff had obtained a modification of the prior dismissal to add the words "without prejudice." 478 F.2d at 364.

These two decisions were condemned in prior editions of Moore's Federal Practice as "unfortunate," 1B Moore's Federal Practice ¶0.409[6] at p. 1035 n. 13 (2d Ed. 1982), but such criticism, and the reservations of Judge Friendly, were forgotten in the decision below, Judge Kaufman referring only to "[t]he longstanding rule in this Circuit." (A4)

The current edition of Moore's Federal Practice simply juxtaposes the

Second Circuit decisions and this Court's opinion in Costello, suggesting the incompatibility. See 1B Moore's Federal Practice ¶0.409[6] at 339-41 (1983). The Second Circuit rule also violates the dictates of common sense, since it suggests that a district judge has an option to dismiss "with prejudice" or "without prejudice" in this situation.

B. The Decision Below Creates a Split Among the Circuits

The Court of Appeals for the Fifth Circuit has noted the (prior to the decision in this case) apparent rule in the Second Circuit concerning federal-court dismissals on statute-of-limitations

grounds and specifically rejected it. Henson v. Columbus Bank and Trust Co., 651 F.2d 320, 324 n.3 (5th Cir. 1981). In addition, in the Third Circuit it has been held that a federal-court dismissal on the basis of a local statute of limitations, even if it purported to be "on the merits," could not bar a subsequent suit in another forum with a longer statute. Hartmann v. Time, Inc., 166 F.2d 127, 138 n.17 (3rd Cir.), cert. denied, 334 U.S. 838, 68 S.Ct. 1495, 92 L.Ed. 1763 (1948); see also, Hernandez Jiminez v. Calero Toledo, 576 F.2d 402, 404 (1st Cir. 1978).

These cases do not explicitly discuss the role of Rule 41(b) in such

a dismissal, but it is firmly established in many circuits that Rule 41(b) does not apply where the grounds for dismissal appearing in the order clearly show it could not involve a determination on the merits. See, e.g., Madden v. Perry, 264 F.2d 169, 175 (7th Cir. 1959), cert. den., 360 U.S. 931, 79 S.Ct. 1450, 3 L.Ed.2d 551 (1961); Cosentino v. Local 28, Int'l Org. of Masters, Mates & Pilots, 268 F.2d 648, 652 (8th Cir. 1959); see also Carter v. McGowan, 524 F.Supp. 1119, 1121 (D.Nev. 1981). Indeed, Costello has been followed by the Second Circuit in decisions that are clearly inconsistent with the decision below. See Weston Funding Corp. v. Lafayette Towers, Inc., 550 F.2d 710, 713-14 (2d Cir. 1977);

Saylor v. Lindsley, 391 F.2d 965, 969 (2d Cir. 1968); Nasser v. Isthmian Lines, 331 F.2d 124, 127 (2d Cir. 1964); see also; United States v. Costello, 275 F.2d 355, 362 (2d Cir. 1960), aff'd 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961).

The conflict between these decisions and the rule applied by the Second Circuit in this case has been noted by the leading treatise, see 1B Moore's Federal Practice, ¶0.409[6] at 341 n.30 (1983), which states that the conflict has now rendered the effect of a federal-court dismissal on statute of limitations grounds "uncertain." Id. at 342. This Court can resolve that uncertainty once and for all in this case by reversing the decision below, and put an end to an interpretation

of Rule 41(b) that has been described as "unjust" and "a plain entrapment of the plaintiff." Madden, supra, 264 F.2d at 175. Uniformity of interpretation should be especially important in the case of the Federal Rules of Civil Procedure.

POINT II

THE DECISION BELOW SHOULD BE SUMMARILY REVERSED

If there were any possibility that this Court's holding in Costello did not mandate reversal of the decision below, or that Costello was not correctly decided or was not of continuing vitality, it might be appropriate to accept this case for a plenary hearing on the merits. Upon such a hearing plaintiff would argue that even if Costello did not mandate

reversal the decision below violated the Erie doctrine since the case could have been heard on the merits in the New York courts, because under the law of New York a prior statute-of-limitation dismissal is "on the merits" only in the jurisdiction of the dismissal, see DeCrosta v. A. Reynolds Constr. & Supply Corp., 41 N.Y.2d 1100, 1101-02, 396 N.Y.S.2d 357, 359, 364 N.E.2d 1129 (1977) (citing with approval Restatement of Judgments §49, Comment a), and New York would be expected to follow Costello rather than the Second Circuit's aberrational rule. See generally, Hart and Wechsler's The Federal Courts and the Federal System, pp. 733-34 n. (8) (2d Ed. 1973).

Plaintiff would argue that the decision below violates the full faith and credit doctrine as it applies to federal court interpretations of prior federal decisions, see generally R.E. Degnan, Federalized Res Judicata, 85 Yale L. J. 741 (1976), because the Second Circuit's decision gives the decision of the District Court for the Western District of Washington a different effect than it would have in the Ninth Circuit. It would argue that the decision below deprives petitioner of property, its breach-of-contract cause of action, without due process, since a court cannot both refuse to hear a claim and bar plaintiff from asserting it elsewhere absent either waiver, (i.e., failure to assert the claim where

an opportunity to do so is given), see, e.g., Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 468 n.1, 94 S.Ct. 2504, 2506 n.1, 41 L.Ed.2d 243 (1974) (compulsory counterclaim rule), or misconduct see Link v. Wabash R. Co., 370 U.S. 626, 629-30, 82 S.Ct. 1386, 1388, 8 L.Ed2d 734 (1962) (dismissal with prejudice for failure to prosecute), without violating the dictates of Due Process. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 429, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265, 273-74 (1982); Societe Internationale v. Brownell, 357 U.S. 197, 209, 78 S.Ct. 1087, 1094, 2 L.Ed.2d 1255 (1958). Finally, plaintiff would argue that the Second Circuit

should have recognized the amendment of the prior judgment obtained while this case was on appeal and vacated the grant of summary judgment.

These arguments raise complex issues that would be appropriate for plenary consideration. There is no need for such consideration, however, if this Court agrees with petitioner that Costello mandates reversal of the decision below. If so, summary reversal is appropriate. Plaintiff, which brought this small breach-of-contract action in New York state court, has been forced, because of the refusal of the courts below to following the clear holding of this Court in Costello, to take a costly appeal to the Second Circuit and

to file a petition in this Court, in order to reverse an award of attorneys' fees and to vindicate its right to bring a timely lawsuit asserting a breach-of-contract claim the merits of which have never been considered. It would best serve both the litigants and the courts if Costello were applied to summarily reverse the decision below and allow this action to proceed to its long-postponed hearing on the merits.

CONCLUSION

Since the decision below conflicts with a holding of this Court, and creates a split among the circuits with respect to a Federal Rule of Civil Procedure, this

petition should be granted and the decision below reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 595—August Term, 1982

(Argued January 7, 1983 Decided February 18, 1983)

Docket No. 82-7658

PRC HARRIS, INC.,

Plaintiff-Appellant,

—against—

THE BOEING COMPANY,

Defendant-Appellee.

Before:

KAUFMAN, TIMBERS, and NEWMAN,

Circuit Judges.

Appeal by the plaintiff from a judgment entered on an order of the United States District Court for the Southern District of New York, Kevin T. Duffy, *Judge*, holding the plaintiff's cause of action for breach of contract barred by *res judicata*.

1933

Affirmed in part, reversed and remanded in part. Judge Newman concurs in a separate opinion.

HARRY H. WISE, III, New York, New York (Gadsby & Hannah, *of Counsel*), *for Plaintiff-Appellant.*

MELVIN A. SCHWARTZ, New York, New York (Dechert, Price & Rhoads, *of Counsel*), *for Defendant-Appellee.*

KAUFMAN, *Circuit Judge*:

This appeal from a judgment entered on Judge Duffy's order raises an unusual issue concerning the application of *res judicata*. That doctrine is rooted, of course, in considerations of finality and repose, and bars relitigation of issues which were or could have been adjudicated in an initial proceeding.

I

The facts underlying this dispute may be recounted briefly. PRC Harris, Inc. ("Harris"), an engineering firm, filed an action against The Boeing Company in the District of Columbia district court in April 1980, alleging failure to pay for services rendered. In October 1980 the case was transferred to the Western District of Washington on Boeing's motion. Chief Judge McGovern granted Boeing's motion for dismissal on September 21, 1981,

holding the action time-barred pursuant to the applicable three year District of Columbia statute of limitations. Harris did not appeal this determination.

In May 1982 Harris filed a complaint in New York State Supreme Court, which it concedes is virtually identical to that filed in the initial action. Boeing responded by filing a petition pursuant to 28 U.S.C. § 1441, seeking to have the cause removed to the Southern District of New York. After removal Boeing petitioned for summary judgment, asserting that the dismissal in Washington operated as an adjudication on the merits, and that consideration of the subsequent suit was therefore prohibited by *res judicata*. Judge Duffy granted Boeing's motion, dismissed the action, and awarded Boeing attorney's fees in the amount of $2,135. Harris filed a timely notice of appeal to this court.

After its action had been dismissed by Judge Duffy and the notice of appeal was filed, Harris returned to the Western District of Washington and petitioned Chief Judge McGovern to amend the judgment entered on his order. The district judge granted the motion, and pursuant to Fed. R. Civ. P. 60(b)(6) amended the judgment to specify that the dismissal was without prejudice.

Harris raises a number of claims on this appeal. It contends, first, that Judge Duffy improperly held the initial Washington judgment to be an adjudication on the merits to which *res judicata* attached. Alternatively, Harris asserts that the subsequent modification of the Washington judgment undercuts the basis for Judge Duffy's holding. Finally, appellant challenges the award of fees to Boeing's counsel.

II

Fed. R. Civ. P. 41(b) governs the effect given involuntary dismissals. In relevant part, the Rule states, "Unless the court in its order for dismissal otherwise specifies, a dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." In such a situation, *res judicata* would preclude a subsequent action on the same claim. *See Elfenbein* v. *Gulf & Western Industries, Inc.*, 590 F.2d 445, 449 (2d Cir. 1978) (per curiam); *La Societe Anonyme des Parfums Le Galion* v. *Jean Patou, Inc.*, 495 F.2d 1265, 1275 (2d Cir. 1974).

In the instant dispute the initial dismissal of Harris's complaint did not entail a consideration of the substantive issues raised, because Chief Judge McGovern's action was based upon his conclusion that the contract claims were barred by the statute of limitations. The longstanding rule in this Circuit, however, is that a dismissal for failure to comply with the statute of limitations will operate as an adjudication on the merits, unless it is specifically stated to be without prejudice.[1] *See Bertha Building Corp.* v. *National Theatres Corp.*, 248 F.2d 833,

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[1] Harris asserts that application of Rule 41(b) to dismissals on statute of limitations grounds in a diversity case would raise potential constitutional problems under the "*Erie* doctrine," *see Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1937), because it would have the effect of abrogating state substantive law. This court explicitly considered and rejected such a claim in *Kern* v. *Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962), noting that while state law controlled the rights and obligations of the parties, determining the *res judicata* effect that will be given the judgment of a federal court is distinctively a matter of federal law. *See also* Degnan, Federalized Res Judicata, 85 Yale L.J. 741 (1976). Accordingly, we reject Harris's claim.

840 (2d Cir. 1957); *Sack* v. *Low*, 478 F.2d 360 (2d Cir. 1973). *See also Murphy* v. *A/S Sobral*, 187 F. Supp. 163 (S.D.N.Y. 1960) (concerning a dismissal for laches); *Wachovia Bank & Trust Co. N.A.* v. *Randell*, 485 F. Supp. 39 (S.D.N.Y. 1979). Moreover, Rule 41(b) dictates that all but certain enumerated dismissals will be considered "on the merits," and the Rule does not exempt a dismissal on statute of limitations grounds from its general operation.[2] Appellant has advanced no persuasive grounds for departing from the clear terms of 41(b), and accordingly, we reject its assertion that the September 21, 1981 judgment allowed relitigation of the issues raised in that proceeding.

The unusual aspect of this case arises as a consequence of Chief Judge McGovern's amendment of his judgment after Judge Duffy had already granted Boeing's motion for summary judgment and dismissed Harris's claims. It is clear that if, at the time of entry, the Washington judgment had been denominated "without prejudice," Rule 41(b) would have been inapplicable, and Harris could legitimately have reasserted its allegations in another jurisdiction. *See Elfenbein* v. *Gulf & Western Industries, Inc.*, *supra*. The issue before us is not presented in such pristine form, however. The original Washington decision did not purport to dismiss the claims without prejudice, and Harris successfully amended that

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2 *Costello* v. *United States*, 365 U.S. 265, 284-88 (1961), upon which Harris relies is similarly inapposite. In *Costello* the court merely held that a dismissal caused by petitioner's failure to file a required affidavit of good cause was, in effect, a dismissal for lack of jurisdiction, one of the specific exceptions to Rule 41(b). The decision did not consider a dismissal on statute of limitations grounds, and indeed, our decision in *Sack* v. *Low*, 478 F.2d 360 (2d Cir. 1973), holding that such an action was covered by 41(b) was rendered after the *Costello* opinion.

judgment only after the completion of the action in the Southern District of New York.

Harris moved to amend the Washington judgment pursuant to Federal Rule 60, which provides that a party may petition for "relief from [a] judgment or order" on a series of enumerated grounds, or "for any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). This provision does not impose a particular time limit, but only requires that the motion be made within "a reasonable time." In considering whether a Rule 60(b)(6) motion is timely, we must scrutinize the particular circumstances of the case, and balance the interest in finality with the reasons for delay. *Amoco Overseas Oil Co.* v. *Compagnie Nationale Algerienne De Navigation*, 605 F.2d 648 (2d Cir. 1979); *Ashford* v. *Steuart*, 657 F.2d 1053 (9th Cir. 1981)(per curiam).

Harris has presented no persuasive reasons to justify the delay of almost one year in moving for amendment of the Washington judgment. The clear terms of Rule 41(b) should have made it apparent that some clarification of Chief Judge McGovern's order would have been necessary if Harris intended to raise its contract claims in some other forum. Harris, however, filed a second complaint, saw the case removed to a federal court, opposed a motion for summary judgment, and even proceeded to appeal by filing a notice before it ultimately decided to return to Washington and seek clarification of the September 21 judgment. Moreover, after obtaining an amendment of the judgment, Harris did not return to the Southern District of New York to attempt to present this new evidence to the district judge, but chose to raise the issue for the first time before this court. It is difficult, therefore, to view Harris as having complied with the reasonable time requirement of Rule 60(b)(6).

In previous situations in which we have had the opportunity to elaborate on the requirements of 60(b)(6), we have noted that because of the potentially broad scope of that provision, relief should only be granted where the moving party has demonstrated "extraordinary circumstances" or "extreme hardship." *See, e.g., United States* v. *Cirami*, 563 F.2d 26, 32 (2d Cir. 1977); *see also Klapprott* v. *United States*, 335 U.S. 601, 613 (1949); *Ackermann* v. *United States*, 340 U.S. 193, 197 (1950). Harris has not presented us with any special circumstances which would justify the extraordinary relief provided for by Rule 60. It appears that Harris's delay in moving for amendment resulted from its failure to understand the effect of Rule 41(b). This is an insufficient basis for relief from a judgment pursuant to Rule 60. *See United States* v. *Erdoss*, 440 F.2d 1221, 1223 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971).

We are also doubtful of the propriety of Harris's motion for amendment of the judgment pursuant to Rule 60. Rule 60(b)(6) is a broadly drafted "umbrella provision," which must be read in conjunction with the other sections of that Rule, and is applicable only where the more specific provisions do not apply. *See Amoco Overseas Oil Co.* v. *Compagnie Nationale Algerienne De Navigation*, *supra*, 605 F.2d at 656 n.8; *United States* v. *Cirami*, *supra*, 563 F.2d at 32; *Corex Corp.* v. *United States*, 638 F.2d 119, 121 (9th Cir. 1981). It is also reasonable to view 60(b)(6) together with Rule 59, which specifically addresses the issue of amending a judgment. *United States* v. *Hall*, 463 F. Supp. 787, 791 n.1 (W.D. Mo.) (on motion for review of judgment), *aff'd*, 588 F.2d 1214 (8th Cir. 1978). Rule 59(e), which imposes a strict ten-day time limit, would more appropriately have been employed in the present case to amend the Washington

judgment. *Sack* v. *Low*, *supra*, 478 F.2d at 362-63 n.1.[3] Of course, a motion pursuant to Rule 59 would not have been timely because Harris did not seek clarification of Chief Judge McGovern's judgment within ten days. Harris, however, should not be able to circumvent the time requirement of Rule 59 by relying on Rule 60 which, in any event, would not save the action. *See Hahn* v. *Becker*, 551 F.2d 741, 745 (7th Cir. 1977).

Accordingly, it is our view that Chief Judge McGovern improperly granted Harris's motion to amend the Washington judgment. If the motion was properly made pursuant to Rule 60, Harris has failed to demonstrate extraordinary circumstances which would have justified the relief sought, particularly in light of its unreasonably long delay in submitting the motion. Alternatively, if the motion should have been made under Rule 59(e), Harris's failure to comply with the time requirements of that provision would have precluded the court from entertaining the motion. It is not, of course, within our power to reverse a judgment of the Western District of Washington, but we need not recognize and defer to such a judgment where the judicial proceedings in this Circuit have already been terminated, after much maneuvering in the district court. *See Sack* v. *Low*, *supra*, 478 F.2d at 362-63 n.1.

We therefore hold that Judge Duffy properly granted Boeing's motion and dismissed Harris's complaint, and we decline to give retroactive effect to the subsequent

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3 In *Sack* v. *Low*, *supra*, 478 F.2d at 362-63 n.1, we allowed a judgment to be amended to specify that it was without prejudice pursuant to Rule 60. We carefully noted, however, that ordinarily such a motion would have to be made under Rule 59, and only the "unusual circumstances" of that case allowed for a departure from this requirement. *Id.* We see no such evidence of unique or special circumstances in the present action.

amendment of the Washington judgment and thereby undercut the legal basis for Judge Duffy's decision.

III

The final issue raised is disposed of in briefer fashion. The district court awarded Boeing $2,135 in attorney's fees. No reason was provided to justify this award, and we can only assume that the district judge considered Harris's complaint to be frivolous.

Ordinarily attorney's fees should not be granted to a prevailing party in the absence of statutory authorization. *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). A narrow exception to this general rule exists when the claims asserted are "entirely without color and [have] been asserted wantonly, for purposes of harassment or delay, or for other improper reasons." *Browning Debenture Holders' Committee* v. *DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir. 1977); *see also Nemeroff* v. *Abelson*, 620 F.2d 339, 349 (2d Cir. 1980) (per curiam). Although it may legitimately be argued that Harris's claims were entirely meritless, we see no indication in the record that they were raised in bad faith or for other improper reasons. Accordingly, we see no basis for the award of fees to Boeing's counsel.

That portion of the judgment entered on Judge Duffy's order granting Boeing's motion for summary judgment and dismissing Harris's claims as barred by *res judicata* is affirmed. The judgment is reversed insofar as it authorized an award of attorney's fees to Boeing, and the case is remanded for the entry of an amended judgment.

NEWMAN, *Circuit Judge*, concurring:

In *Sack v. Low*, 478 F.2d 360 (2d Cir. 1973), a District Court in the Southern District of New York had dismissed a claim because of *res judicata*, relying on a judgment of the District Court for the District of Massachusetts. The Massachusetts court had found the claim barred by the local statute of limitations. While an appeal from the Southern District's judgment was pending, the plaintiffs secured from the District of Massachusetts an order amending the Massachusetts judgment to specify that the dismissal in Massachusetts was without prejudice. In the "unusual circumstances" of that case,[1] *id.* at 362 n.1, we ruled that the amendment of the Massachusetts judgment was effective to permit the plaintiffs to proceed in the Southern District, where the applicable limitations period had not expired. Once *Sack v. Low* was decided, any plaintiff suing in this Circuit, whose case had been dismissed elsewhere on statute of limitations grounds, was on notice of the need to secure a "without prejudice" notation on the prior judgment.

In this case, the plaintiff litigated in the Southern District of New York the preclusive effect of a judgment entered in the Western District of Washington, without bothering to obtain a "without prejudice" notation on the Washington judgment. Only after litigating unsuccess-

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[1] In *Sack v. Low*, *supra*, we were willing to indulge the plaintiffs with the assumption that, despite *Bertha Building Corp. v. National Theatres Corp.*, 248 F.2d 833, 844 (2d Cir. 1957), *cert. denied*, 356 U.S. 936 (1958), they could not have been expected to anticipate, prior to judgment in the Southern District, that the dismissal with prejudice in the District of Massachusetts, on statute of limitations grounds, would be held to bar their suit in the Southern District of New York. 478 F.2d at 362 n.1. After *Sack v. Low*, there can be no uncertainty on that score.

fully in the Southern District did plaintiff move in the Western District of Washington for an amended judgment. I agree that this maneuver must fail, but I would rely simply on the fact that a judgment of dismissal was properly entered in the Southern District of New York before the plaintiff returned to the Western District of Washington.[2] I would not assess whether the delay in making a Rule 60(b) motion in Washington made it inappropriate for the District Court there to grant the motion, nor whether Rule 60(b) provided any basis for relief, since we have no oversight authority concerning that court.[3] Focusing on whether the judgment of a district court within our Circuit was entered before or after another district's "without prejudice" notation results in a rule of clarity and easy administration. It also confines our consideration solely to the appropriateness of the actions taken by district courts within our Circuit.

For these reasons, I concur in the result.

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2 The circumstances of this case are to be contrasted with a case in which a judgment of court *B* is based on a judgment of court *A* and the judgment of court *A* is reversed on appeal, while the judgment of court *B* is pending on appeal. In that circumstance the appellate court would normally set aside the judgment of court *B*. *See* Restatement (Second) of Judgments § 16 comment c (1980). The determination that court *A*'s judgment is erroneous is properly noticed on appeal from court *B*'s judgment. In the instant case, however, the judgment of the Washington Court has not been held to be erroneous; the plaintiff has simply availed itself of an option to secure a "without prejudice" notation. A plaintiff who elects to forgo use of that option until after an adverse judgment has been rendered against him in another jurisdiction should not expect a court of appeals to reward his tardiness. After being late to sue in the first jurisdiction, he ought to move expeditiously to maintain his opportunity to sue elsewhere.

3 There is no issue in this case requiring scrutiny of a judgment of another jurisdiction to determine if the court rendering the judgment had jurisdiction.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of May, one thousand nine hundred and eighty-three.

PRC HARRIS, INC.,

Plaintiff-Appellant,

v.

THE BOEING COMPANY,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel, plaintiff-appellant, PRC Harris, Inc.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by /s/ Victoria C. Dalton
Deputy Clerk

DISTRICT COURT DECISION.

PRC HARRIS, INC., Plaintiff,

v.

The BOEING COMPANY, Defendant.

No. 82 Civ. 3284 (KTD).

United States District Court,
S. D. New York.

Aug. 12, 1982.

Action was brought to recover for engineering services. Defendant moved to dismiss action after it was removed from state court on diversity jurisdiction grounds. The District Court, Kevin Thomas Duffy, J., held that dismissal of a prior action on statute of limitations grounds was an adjudication on the merits which barred bringing of the subsequent identical action in another jurisdiction.

Ordered accordingly.

Judgment ⇐570(5)

Dismissal of action on statute of limitations grounds was an adjudication on the merits which barred bringing up a subsequent identical action in another jurisdiction. Fed.Rules Civ.Proc. Rule 41(b), 28 U.S.C.A.

Gadsby & Hannah, New York City, for plaintiff; Harry H. Wise, III, New York City, of counsel.

Dechert, Price & Rhoads, New York City, for defendant; Melvin A. Schwarz, New York City, of counsel.

KEVIN THOMAS DUFFY, District Judge:

This case presents an interesting application of the doctrine of *res judicata*. Plaintiff PRC Harris, Inc. ("Harris"), a New York corporation, alleges that the defendant Boeing Company, a Washington corporation, failed to pay $14,983.00 for engineering services rendered in the State of West Virginia between April, 1975 and May, 1976. The instant case was originally commenced in New York State Supreme Court, New York County, on or about May 5, 1982. Boeing subsequently removed the lawsuit to this court on diversity jurisdiction grounds.

Back in 1980, Harris had filed a complaint against Boeing in the United States District Court for the District of Columbia seeking *inter alia* the same relief sought in the instant lawsuit. A motion for change of venue to the Western District of Washington was subsequently granted. The federal court in Seattle, applying the three year statute of limitation of the District of Columbia, granted a motion by defendant to dismiss the case on September 21, 1981. In so doing, the court did not specify whether this dismissal was with or without prejudice.

Boeing now moves to dismiss the instant action on grounds that the earlier dismissal of an identical complaint involving identical

parties was with prejudice, and therefore the doctrine of *res judicata* bars this lawsuit. Boeing asserts that pursuant to Fed. R.Civ.P. 41(b) the prior dismissal is assumed to be with prejudice and "on the merits" because the district judge did not state otherwise. Boeing also moves for an award of attorneys' fees and costs.

Plaintiff argues, however, that under Rule 41(b) the prior dismissal was not on the merits. That rule provides in pertinent part:

> *Involuntary Dismissal: Effect Thereof*
>
> • • • • • •
>
> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Harris contends that a dismissal under the statute of limitations is a dismissal for "lack of jurisdiction" and therefore not an adjudication on the merits which would bar subsequent suits.

I disagree. Although there does appear to be some confusion regarding the *res judicata* effect of a dismissal on statute of limitations grounds, *compare* 5 Moore's Federal Practice ¶ 41.14[1] at 41–207 (2d ed. 1982) *with* 1B Moore's Federal Practice ¶ 0.409[6] at 1035–36 (2d ed. 1982), the current law in this and other circuits appears to be that such a dismissal is on the merits.

In *Sack v. Low*, 478 F.2d 360 (2d Cir. 1973), the Second Circuit held that a dismissal based on the state statute of limitations was an adjudication on the merits unless, as was the case in *Sack*, the judge in the prior case stated the dismissal was without prejudice. Writing for the court, Judge Friendly expressed "some discomfort" with affording a judge the discretion under Rule 41(b) "to dictate to another forum that a dismissal should have a different effect there than in his own court," 478 F.2d at 365, but nevertheless permitted this result as dictated by prior case law. Thus, *Sack* and other decisions by this court, *see, e.g., Wachovia Bank & Trust Co., N. A. v. Randell*, 485 F.Supp. 39 (S.D.N.Y.1979); *Murphy v. A/S Sobral*, 187 F.Supp. 163 (S.D.N.Y.1960), reaffirm this Circuit's position that a dismissal on statute of limitations grounds is on the merits and, if anything, call into question the primary judge's discretionary power to say otherwise. *Accord, Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978).

Policy considerations also require dismissal of the plaintiff's complaint. If the instant case was not barred Harris would be free to roam to other states with different statutes of limitation where Boeing, a large corporation, could be found present. This result would subvert the judicial system's interest in having disputes finally resolved.

For the foregoing reasons, the defendant's motion is granted. The complaint is dismissed. The motion for costs and fees is granted.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - -x

PRC HARRIS, INC., :

Plaintiff, : 82 Civ. 3284 (KTD)

-against- :

JUDGMENT

THE BOEING COMPANY, :

Defendant. :

- - - - - - - - - - - - - -x

This action came on to be heard on defendant's motion for summary judgment and for attorneys' fees, and the Court, Honorable Kevin Thomas Duffy presiding, having granted said motion, it is hereby

ORDERED AND ADJUDGED that the action be dismissed with prejudice and that defendant recover its attorneys' fees in the amount of $2,135 and its costs, to be

taxed by the Clerk.

Dated: New York, New York, August 19, 1982

/s/ Kevin Thomas Duffy
U.S.D.J.

JUDGMENT ENTERED 8/24/82

/s/
Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

PRC/HARRIS, INC.,	:	
Plaintiff,	:	NO. C80-1184M
v.	:	ORDER GRANTING DEFENDANT'S MOTION TO DISMISS
THE BOEING COMPANY,	:	
Defendant.	:	

The defendant Boeing Company built a Personal Rapid Transit System (PRT) for the University of West Virginia at Morgantown. In 1973 and 1974 Boeing, the prime contractor, executed two written contracts with the plaintiff related to a Guideway Heating System for the PRT. Under the first contract, Harris agreed to "complete the design of the PRT Guideway Heating

System". Under the second, Harris agreed to provide the services of one design engineer to support Boeing at Morgantown.

The first contract contained the following applicable law clause, which was incorporated by reference in the second contract:

> "This contract shall be governed by the law of the State of Washington."

It is undisputed that Harris completed its work under both contracts in 1974. The complaint alleges that as of on or before October 31, 1974, Boeing owed Harris the sum of $417.30 for work completed by Harris under the second contract.

On March 11, 1975, a "flashback explosion" occurred in Boiler Plant No. 2

of the PRT system. Boeing directed all of the companies involved in the design, installation and maintenance of the boiler system to attend a meeting in Morgantown on April 23, 1975, "for the purpose of establishing an adequate design fix and rework responsibility to prevent future boiler shutdown explosions." Boeing's directive noted that Harris' attendance at the April meeting would be at Harris' own expense. Complaint, paragraph 11.

As designer, Harris agreed to attend the meeting. Prior to the meeting, however, Harris specifically informed Boeing that "we will expect reimbursement for all expenses incurred by Frederic R. Harris, Inc. in connection with this

meeting" in the event that the explosion was not caused by any deficiency in Harris' boiler plant design. Complaint, paragraph 12. On November 21, 1975, Boeing informed Harris that the boiler flashback problem had not been solved, and that further corrective measures would be necessary. Complaint, paragraph 14. Harris incurred substantial expenses in attempting to assist Boeing in ascertaining the cause of the explosions in Boiler No. 2. Between March 11, 1975 and May 30, 1976, Harris incurred expenses of $14,983.00. Complaint, paragraph 19.

Harris filed the instant action for judgment in the amounts of $417.30 and $14,983.00, plus interest, in the United States District Court for the District of

Columbia on April 16, 1980.

Boeing moved to dismiss based inter alia upon the three-year limitations provision of the D.C. Code §12-301(3), (7) and (8), and for a change of venue to the Western District of Washington. The motion for change of venue was granted on October 27, 1980.

This matter comes on for consideration by the undersigned Judge of the above-entitled Court upon the defendant's motion to dismiss. Relying on the applicable law clause in the contracts, the plaintiff contends that Washington's six-year statute of limitations for a contract in writing, or on express or implied liability arising out of a written agreement, applies. R.C.W. 4.16.040(2).

Boeing contends that even if Washington's limitations provisions apply (which Boeing denies), the plaintiff's principal claim for $14,983.00 for work performed on behalf of Boeing in 1975 and 1976 to determine the cause of the explosions in Boiler No. 2 did not arise out of the written contracts executed by and between plaintiff and defendant in 1973 and 1974. For that reason, the argument goes, Washington's three-year limitations provision would apply to bar the instant action.

Boeing's primary argument is that the choice of law rules of the original forum, the District of Columbia, must apply, the change of venue in this federal action notwithstanding. In the

District of Columbia, questions of limitations are procedural in nature and governed by the law of the forum, not as the plaintiff now contends by an applicable law clause struck by and between parties to the contract.

The applicable District of Columbia limitations period is three years, under D.C. Code §12-301(3), (7) and (8). That in the instant circumstances the Court must apply the limitations provisions of the District of Columbia, is clear. VanDusen v. Barrack, 376 U.S. 612, 637, 639 (1964); Schenk v. Piper Aircraft Corporation, 377 F.Supp. 477, (W.D. Pa. 1974), aff'd, 521 F.2d 1399 (3rd Cir. 1975) and aff'd, 557 F.2d 742 (6th Cir. 1978); and Brick v. Dominion

Mortgage and Realty Trust, 442 F.Supp. 283, 299-300 (W.D. N.Y. 1977). Such a holding is required here, the applicable law clause advanced by the plaintiff notwithstanding. Alaska Airlines, Inc. v. Lockhead Aircraft Corporation, 430 F. Supp. 134, 139 (D. Alas. 1977); and Cleveland Lumber Company v. Proctor & Schwartz, Inc., 397 F.Supp. 1088, 1091 (N.D. Ga. 1975).

It being the opinion of the Court that the plaintiff's claims in the amounts of $417.30 and $14,983.00 are time-barred by the applicable statute of limitations, now therefore.

IT IS ORDERED that the motion to dismiss the action be and the same is hereby GRANTED.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED this 21st day of September, 1981.

/s/ Walter T. McGovern
WALTER T. McGOVERN
Chief United States
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

- - - - - - - - - - - - - - - -x

PRC/HARRIS, INC.,

Plaintiff,

v.

THE BOEING COMPANY,

Defendant.

- - - - - - - - - - - - - - - -x

NO. C80-1184M

JUDGMENT

This matter having come on for consideration before the Court, Honorable Walter T. McGovern, Chief United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, granting defendant's motion to dismiss,

IT IS HEREBY ORDERED AND ADJUDGED,

that this action is hereby DISMISSED.

DATED this 21st day of September, 1981.

/s/ John A. McLellan
Deputy United States District Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

PRC/HARRIS, INC.,	:	
Plaintiff,	:	NO. C80-1184M
v.	:	ORDER GRANTING PLAINTIFF'S
THE BOEING COMPANY,	:	MOTION FOR RELIEF UNDER RULE 60
Defendant.	:	

THIS MATTER comes on for consideration by the undersigned Judge of the above-entitled Court upon the plaintiff's motion for an order "granting relief from the judgment entered in this action on September 21, 1982, dismissing the action on the grounds that plaintiff's claims were barred by the applicable statute of limitations, such relief

consisting of the addition of the words 'without prejudice' to the judgment."

Having considered the entire record, including but not limited to the argumentation and the authorities advanced in support of and in opposition to the motion to amend, the Court concludes that the plaintiff is entitled to the relief requested.

The judgment entered on September 21, 1981, was not an adjudication on the merits and is without prejudice to the plaintiff's right to bring another action in another jurisdiction upon the actions from which their claims herein arise, subject to the appropriate statute of limitations of such other jurisdiction.

Boeing opposes the relief requested

on the grounds that (1) plaintiff's motion is not timely under Rule 59(e), Fed. R. Civ. P., and (2) because "it is not the function of this Court to instruct the United States District Court for the Southern District of New York regarding the judicial treatment to be accorded final judgments in that jurisdiction." Neither argument can withstand the authority of Sack v. Low, 478 F.2d 360, 364 (2d Cir. 1973), relied on by the parties, including but not limited to footnote 1 at page 362.

The Clerk of the Court is directed to enter an amended judgment granting defendant's motion to dismiss the action without prejudice.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED this 20th day of September, 1982.

/s/ Walter T. McGovern
WALTER T. McGOVERN
Chief United States
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

- - - - - - - - - - - - - - - -x

PRC/HARRIS, INC., :

Plaintiff, : NO. C80-1184M

v. :

JUDGMENT

THE BOEING COMPANY, :

Defendant. :

- - - - - - - - - - - - - - - -x

This matter having come on for consideration before the Court, Honorable Walter T. McGovern, Chief United States District Judge, presiding, and the issues having been duly considered and a decision having been rendered, granting defendant's motion to dismiss the action without prejudice,

IT IS HEREBY ORDERED AND ADJUDGED, that this action is hereby dismissed without prejudice.

DATED this 20th day of September, 1982.

/s/ John A. McLellan
Deputy United States District Clerk

STATEMENT OF CORPORATE AFFILIATES

Consoer Townsend Harris International, Inc.; California Airport Consultants, Inc.; Consoer & Morgan; Consoer, Townsend & Associates; Consoer, Townsend & Associates in Michigan; PRC Environmental Management, Inc.; ECI-SECO; ECI-SINOTECH; Resources Engineering Consultants Company, Ltd.; Pirnie Harris International; Frederic R. Harris of Canada, Ltd.; Frederic R. Harris Engineering Corporation; DIT-Harris, S.A.; Harris Solarian; Brown, Ames, Harris; Harris - Toups; PRC Harris/Dynatrend; Harris do Brazil, Ltda.; Frederic R. Harris & Partners, Ltd.; Harris & Partners Consulting Engineers (unltd); PRC Harris Associates; Parsons, Brown, Harris; Frederic R. Harris (Holland) B.V.; International Engineers and Planners, B.V.; RAMP Engineering, Nederland; Inter Ramp; Tukker's Advies-En Beheermaatschappij (Interconstruct), B.V.; PRC Architecture, Limited; PRC Engineering, Ltd.; Frederic R. Harris (Belgium), S.A.; Groupe d'Etudes Courtoy - PRC; Styfhals-Pirnay-Harris; Girec Harris; Polytecna Harris, S.p.A.; P.H. & Partners S.r.l.; Compagnia Tecnica Meridionale, S.r.l. (CO TE M); Global Consultants, Inc.; HBA, S.A.; Vasconayarra de Ingeniera, S.A.; Delineacion, S.A.; Salah Abaalkhail PRC; Adibi Harris Associates; PRC Iran; Harris & Abayomi Olufawo & Partners; Harris Etteh Aro;

Murphy Engineering and Harris; Harris Russell; Engineering Consultants, Ltd.; Escy Consultants Limited; Read, Voorhees & Associates, Limited; RVA Engineering, Ltd.; RVA Omni-Sports, Inc.; Sportsturf Systems Inc.; PRC (Nigeria), Ltd.; Toups-Montgomery; Toups-Hawks & Associates

OFFICE SUPREME COURT, U.S.
FILED
OCT 11

No. 83-251

IN THE

Supreme Court of the United States

October Term, 1983

PRC HARRIS, INC.,

Petitioner

v.

THE BOEING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Robert A. Cohen
Melvin A. Schwarz
Lisa D. Filloramo
DECHERT PRICE & RHOADS
477 Madison Avenue
New York, New York 10022
(212) 308-4400

Attorneys for Respondent,
The Boeing Company

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Second Circuit err in reaffirming that a dismissal of a federal court action because of the bar of the applicable state statute of limitations is a dismissal with prejudice which prevents subsequent litigation of the same claim pursuant to Fed. R. Civ. P. 41(b)?

2. Did the Court of Appeals err in applying the language of Fed. R. Civ. P. 41(b) to interpret the meaning of an order of dismissal by a federal court?

3. Did the Court of Appeals err in dismissing petitioner's second cause of action based on the same claim previously dismissed by a federal court when the first action was dismissed pursuant to Fed. R. Civ. P. 41(b) and

petitioner did not seek to amend that first order of dismissal until the district court had dismissed the second cause of action nearly one year after the first court dismissal?

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DESIGNATION OF CORPORATE SUBSIDIARIES AND AFFILIATES

The subsidiaries and affiliates (including joint ventures) of the Boeing Company are set forth in a list at the end of this brief.

COUNTERSTATEMENT OF THE CASE

Respondent The Boeing Company incorporates herein the statement of facts set forth by the Court of Appeals for the Second Circuit (Petition, pp. A2-A3).

REASONS FOR DENYING THE WRIT

Introduction

The petition for a writ of certiorari should be denied both because the decision below is consistent with this Court's decisions and because there is no conflict among the courts of appeals as to the questions presented by the petition. Petitioner's claims to the contrary are supported only by distortions and misstatements of the cited cases.

I. The Decision Below Does Not Conflict With the Rulings of This Court

The Court of Appeals for the Second Circuit, consistent with its prior decisions in Bertha Building Corp. v. National Theatres Corp., 248 F.2d 833 (2d Cir. 1957), cert. denied, 356 U.S. 936 (1958) and Sack v. Low, 478 F.2d 360 (2d Cir. 1973), applied the plain language of Fed. R. Civ. P. 41(b) and

held that a federal court dismissal on the basis of a statute of limitations bar is a dismissal with prejudice. Rule 41(b) provides that only dismissals for lack of jurisdiction, improper venue or failure to join a party under Fed. R. Civ. P. 19 can be considered, unless otherwise specified, as dismissals without prejudice. A statute of limitations dismissal by a federal court falls into none of these categories and is therefore to be construed as a dismissal with prejudice. No federal court has ever held otherwise and petitioner cites no contrary authority.

Instead, petitioner would attempt to construe a statute of limitations dismissal as a dismissal for lack of jurisdiction and thereby bootstrap its way into the exceptions under Rule 41(b) to the general presumption of

dismissal with prejudice. To support that theory, petitioner relies upon Costello v. United States, 365 U.S. 265 (1961). In Costello, this Court held that a dismissal for failure to file an affidavit of good cause in a denaturalization proceeding was a dismissal for lack of jurisdiction within the meaning of Fed. R. Civ. P. 41(b) because the filing of such an affidavit was a prerequisite to the court hearing the case at all. As the decision below noted (Petition, p. A5, n.2), Costello in no way considered whether a statute of limitations dismissal was a dismissal for "lack of jursidiction."

Petitioner goes on to argue, however, that the decision below did not distinguish Costello on a "principled basis" (Petition, p. 14) and that Costello requires that only decisions

based on a hearing of the substantive facts at issue can be a dismissal on the merits. That claim ignores the fundamental point of Costello, Rule 41(b) and the prior case law. Dismissals for lack of jurisdiction occur where the court is prevented by some precondition from even beginning to consider the matters alleged. A timebar determination, by contrast, assumes or decides that a court can consider the issues but refuses to do so because of the staleness of the claim. Indeed, to obtain a dismissal based on the applicable statute of limitations requires the court to assume jurisdiction and consider the facts alleged concerning the nature of the case and the timing of the alleged events to determine (1) which statute of limitations applies and (2) whether the events occurred within the

limitations period.* This distinction was recently reaffirmed and explained by the Court of Appeals for the Fifth Circuit, en banc, in Nilsen v. City of Moss Point, 701 F.2d 556, 562 (5th Cir. 1983) (en banc).

Moreover the decision below does not conflict in any conceivable fashion with the principles of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), or the full faith and credit doctrine. The question at issue is the interpretation of the meaning of a federal court order of dismissal pursuant to the terms of Fed. R. Civ. P. 41(b). There is no state law question raised for consider-

* In this case, the court not only took jurisdiction but transferred the action from the District of Columbia federal court to the District of Washington before that court considered whether the alleged breach of contract occurred more than three years before the filing of the suit in the District of Columbia.

ation by the courts in this case. It was petitioner who brought its first action in federal court and itself chose to be bound by the principles of Fed. R. Civ. P. 41(b). Petitioner cannot now claim that it would rather have state law rules of procedure be applied to interpret the meaning of a federal court order. Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962). See also, Degnan, Federalized Res Judicata, 85 Yale L.J. 741 (1976).

Petitioner's full faith and credit argument apparently rests on the view that the court of appeals failed to give proper respect to the belated amendment by the Seattle federal court of its order of dismissal almost one year after the entry of the order and after the New York federal district court had ruled that the Seattle judg-

ment was a dismissal with prejudice barring relitigation of the claim. Petitioner's argument rests on no citations of this Court's or any other court's decisions. The argument is also defective in that it rests on the false premise that the court of appeals in some fashion overturned the decision of the Seattle court. The reality is that the court did what appellate courts are supposed to do - render an opinion based on the record before the district court. See United States v. Alldredge, 432 F.2d 1248, 1250 (3d Cir. 1970). The court of appeals also refused to consider the belated amendment by the Seattle federal court because there was no explanation offered by petitioner for its one year delay in seeking an amendment of the original judgment. The court pointed out the universally recognized principle

that amendments of final orders under Fed. R. Civ. P. 60(b)(6) are to be granted only in extraordinary circumstances justifying delay (Petition, pp. A7, A11). See Ackermann v. United States, 340 U.S. 193, 202 (1950). Since no reason for delay was even suggested by petitioner, there was no reason for the court of appeals to take the extraordinary step of reaching out beyond the record before the district court to reverse the district court. In short, no constitutional issue is even raised by this petition since the basis for the court's decision is petitioner's unexcused and unexplained delay.

II. There is no Conflict Among the Courts of Appeals Regarding the Issues Presented

Petitioner attempts to create the appearance of a conflict in the decisions of the federal courts of

appeals regarding the issue of the res judicata effect of a statute of limitations dismissal under Fed. R. Civ. P. 41(b). But none of the cases cited, other than the precedent of the Court of Appeals for the Second Circuit (which supports the decision in this case),*

* Petitioner seems to argue that Judge Friendly expressed reservations about this application of Rule 41(b) in Sack v. Low, 478 F.2d 360 (2d Cir. 1973). However, the only doubt expressed there is whether a district court has any discretion at all to order that a statute of limitations dismissal may be without prejudice. Sack v. Low, id. at 364.

In that regard, petitioner argues that it somehow defies common sense to permit dismissals based on a statute of limitations to be without prejudice where the district court so specifies but to be with prejudice where not specified. The existence of such discretion is not before the Court since it was assumed by the court of appeals. The court of appeals was not presented with a record in which the first district court had exercised that discretion. The belated amendment of the Seattle

(footnote continued)

consider the question of whether a statute of limitations dismissal is a dismissal with prejudice under the terms of Fed. R. Civ. P. 41(b). The only other federal court decision to consider that question (uncited by petitioner) is Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978). There, the Court of Appeals for the Sixth Circuit reached the identical result: Rule 41(b) plainly requires that a federal court dismissal based on a statute of limitations defense bars relitigation of the same issues in another court. Since the courts which have considered the central

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(footnote continued)

court's order occurred only after the district court had dismissed the second action. In any event, Rule 41(b) contemplates by its terms the existence of such discretion to order a dismissal as being without prejudice under certain unspecified circumstances.

issue in this case have all reached the same result, there is no conflict for this Court to resolve.

Conclusion

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Dated: October 10, 1983

SUBSIDIARY LIST

The Boeing Company
Aircraft Sales & Financing Corp.
Astro Ltd.
BCS Richland, Inc.
BE&C Engineers, Inc.
BOECON Corporation
Boeing Agri-Industrial Company
Boeing of Canada, Ltd.
Boeing Computer Services Canada Ltd.
Boeing Computer Services (Europe) Ltd.
Boeing Computer Services of Illinois, Inc.
Boeing Computer Support Services, Inc.
Boeing Domestic Sales Corporation
Boeing Electronics, Inc.
Boeing Engineering and Construction Southeast, Inc.
Boeing Environmental Products, Inc.
Boeing Equipment Holding Company
Boeing Financial Corporation
Boeing International Corporation
Boeing International Sales Corporation
Boeing International S.R.L.
Boeing Leasing and Financial Corporation
Boeing Machine Products, Inc.
Boeing Operations International Inc.
Boeing Middle East Limited
Boeing Services International, Inc.
Boeing Technical and Management Services, Inc.
Boeing Technology International, Inc.
Colinco, Inc.
Hydraulic Units Incorporated
Resources Conservation Company
Resources Conservation Company International
Logistics Support Corporation
S.O.D.E.G.E.S.S.
Trans-National Housing Association
Vertol Corporation
234-I, Inc.
234-II, Inc.

727-I, Inc.
747SP-I, Inc.
747SP-II, Inc.
747SP-III, Inc.
747SP-IV, Inc.

	NAME		AFFILIATES
1.	Resource Conservation Company	1.	Boeing Environmental Products
		2.	Reading & Bates Development Company
2.	Solvolco	1.	BEC
		2.	Reading & Bates Development Company
3.	American Management Systems, Inc.	1.	Logica Holdings Ltd.
		2.	Racal-Decca Ltd.
		3.	Sintra-Alcatel S.A.
		4.	Standard Electrik Lorenz AG
		5.	The Boeing Company
		6.	Boeing Operations International, Inc.
		7.	Westinghouse Electric Corporation
		8.	Westinghouse Overseas Corporation
		9.	Informatique de Systemes et de Reseaux (ISR)
		10.	ESG Electronik-System - Gesellschaft mbH
4.	Peabody Holding Company	1.	Newmont Mining Corporation
		2.	The Williams Company
		3.	Bechtel Corporation
		4.	The Boeing Company

5.	Boeing - Lockheed National Air Space Company (NASCO)	1. The Boeing Company 2. Lockheed

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No. 83-251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PRC HARRIS, INC.,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION

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1B Moore's Federal Practice, ¶0.409[6] (1983) 3, 5

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ARGUMENT

THE CASES IN OTHER CIRCUITS CITED BY RESPONDENT AS SUPPORTING THE HOLDING BELOW ARE INAPPOSITE

In Respondent's Brief in Opposition, two cases outside of the Second Circuit are cited as supporting the holding below that a dismissal for failure to comply with a local statute of limitations is a dismissal "on the merits" in the sense of a dismissal that prevents further suit on the cause of action in any jurisdiction. Those cases are Nilsen v. City of Moss Point, 701 F.2d 556, 562 (5th Cir. 1983) (en banc), and Cemer v. Marathon Oil Company, 583 F.2d 830, 832 (6th Cir. 1978). Neither case is apposite, however,

because they each deal with dismissals based on a limitations provision applicable in every state: Nilsen with the timely filing requirements of Title VII, 42 U.S.C. § 2000e-5(e), see Nilsen v. City of Moss Point, Mississippi, 621 F.2d 117, 119 (5th Cir. 1980), and Cemer with the federal statute of limitations applicable to age discrimination suits, 29 U.S.C. §§626(e), 255. Although it is true that in Cemer the court purported to rely on the effect of Rule 41(b) in support of its holding, 583 F.2d at 832, the leading federal procedure treatise has noted that the fact that the first dismissal was based on a statute of limitations applicable in every jurisdiction is the "more tenable justification" for

the holding. 1B Moore's Federal Practice, ¶0.409[6] at 336-37 (1983).

It is true that both of these decisions speak of a statute-of-limitations dismissal as being "on the merits". The confusion that leads respondent to cite Nilsen and Cemer in support of its position, however, is caused by the fact that the phrase "on the merits" can be used in three different senses modifying the word "dismissal". It can be used to mean: (1) a dismissal that examines and evaluates the substantive facts alleged to provide plaintiff a cause of action; (2) a dismissal that, while not actually reaching the substantive allegations, determines that plaintiff cannot sue again in any jurisdiction; and (3) a dismissal that does not

reach the substantive allegations but determines that plaintiff cannot sue again in the particular jurisdiction (but is not necessarily barred from suing elsewhere). These ambiguities have led the American Law Institute to discard the phrase "because of the possibly misleading connotations." Restatement (2d) Judgments §19, Comment a, p. 161 (1982).

Depending on the particular facts, a dismissal on limitations grounds can fall into any of these categories. In those rare instances where the limitations provision is an integral part of a created right, so that the running of the particular statute extinguishes the right, see 1B Moore's Federal

Practice ¶0.409[6] at 334 n.3 (1983), the dismissal falls into category (1). In cases such as Nilsen and Cemer, where the statute is uniform in all jurisdictions, the dismissal falls into category (2). And where, as in this case, the dismissal is based on a local statute of limitations not necessarily applicable in other jurisdictions, the dismissal is one in category (3). See Restatement of Judgments §49 Comment a, at p. 194 (1942).

Thus it is not enough to say that a statute-of-limitations dismissal is "on the merits"; the question is: is the particular dismissal one that bars the plaintiff's second suit? Where the dismissal in jurisdiction A is based on a local statute of limitations, and

jurisdiction B, otherwise open to the plaintiff, would apply a longer statute, the only modern decisional authority known to petitioner supporting the proposition that the first dismissal bars the second suit is the Second Circuit authority challenged by the petition in this case, authority that, as shown in the petition, is based on a reading of Rule 41(b) FRCP that cannot be squared with this Court's holding in Costello v. United States, 365 U.S. 265, 285, 81 S.Ct. 534, 545, 5 L.Ed.2d 551, 564 (1961).

Petitioner submits that it is clear that when this Court held in Costello that Rule 41(b) does not apply to dismissals on grounds that prevent the presentation of "the merits of [plaintiff's] claim,"

365 U.S. at 285, 81 S.Ct. at 545, 5 L.Ed.2d at 564, it was referring to what the court below called "the substantive issues raised" (A4), that is, in this case, whether Boeing breached its contract with PRC Harris. Boeing has never had to prepare to meet that dispute, since it instead raised an initial bar--the District of Columbia statute of limitations.*

Rule 41(b) FRCP performs a valuable function as a "rule of thumb" that provides the effect of a dismissal where the dismissing judge has the discretion to dismiss with or without prejudice (as in

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*Since the raising of such a bar mandates an automatic dismissal, the suggestion of the majority in the en banc Nilsen decision that a statute-of-limitations dismissal represents a "refusal" of the court to speak on the substantive issues, thus differentiating it from a dismissal on jurisdictional grounds, 701 F.2d 562, seems to confuse a limitations dismissal with one for laches. In any event, the "jurisdictional" dismissals there referred to are merely a subset of the "jurisdictional" dismissals under Rule 41(b) as interpreted by this Court.

the case of a Rule 12(b)(6) dismissal where the dismissal can result from a finding either that plaintiff has no cause of action or that plaintiff may have a cause of action but has failed to properly plead it) and has not specified his intent in the order of dismissal. See Weissinger v. United States, 423 F.2d 795, 798 (5th Cir. 1970) (en banc)("The fifth sentence of Rule 41(b) . . . establishes a procedure for construing the general and ambiguous dismissal order, one which does not say whether it is with or without prejudice."); United States v. Costello, 275 F.2d 355, 362 (2d Cir. 1960), aff'd, 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed. 2d 551 (1961); see also, Sack v. Low, 478 F.2d 360, 364 (2d Cir. 1973). The Second Circuit

authorities challenged by this petition are the only federal appellate decisions of which petitioner is aware that have said that Rule 41(b) can turn a dismissal that could not otherwise so operate into a dismissal "with prejudice", and the decision below is the first that has squarely so held. Petitioner submits that such an interpretation is inconsistent with this Court's interpretation of the rule in Costello. See, in particular, 365 U.S. at 287 n.5, 81 S.Ct. at 546 n.5, 5 L.Ed.2d at 565 n.5.

Petitioner has found one decision outside of the Second Circuit applying that court's interpretation of Rule 41(b) to a statute-of-limitations dismissal, Chang v. Northwestern Memorial Hospital, 549 F.Supp. 90 (N.D. Ill. 1982). In that case the

dismissal on statute-of-limitations grounds of a state-court suit being prosecuted concurrently with a federal suit in the same state led to the incongruous situation of the federal suit, which had been timely filed, being dismissed, allegedly on the grounds of res judicata. Although the first dismissal had been stated to be "with prejudice", 549 F.Supp. at 91, the second court placed principal reliance on an Illinois statute modeled after Rule 41(b). 549 F.Supp at 94-95. The incongruity of a timely suit being dismissed for alleged res judicata because a second, untimely, suit in the same jurisdiction had been dismissed on limitations grounds is a direct result of the fallacy inherent in the Second

Circuit's interpretation of Rule 41(b): the belief that Rule 41(b) gives the dismissing judge the discretion to adjudicate, or to decline to adjudicate, "the merits" in a dismissal order clearly based on a ground that is a procedural bar unconnected with the merits of the claim. (This fallacy is further demonstrated at p. 10n of respondent's brief, where it is asserted that the discretion to dismiss "without prejudice" exists under "certain unspecified circumstances", without a suggestion of what those circumstances could possible be.) At least, in Chang, the District Judge invited the plaintiff to seek an amendment of the prior judgment of dismissal, clearly contemplating that such an amendment would allow the federal suit to proceed. 549 F.Supp. at 92.

CONCLUSION

The petition should be granted and the decision below reversed.

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October 13, 1983